IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA AND OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA

PLAINTIFFS

v.

CASE NO.: 05-CV-00329 TCK –SAJ

TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC. CARGILL, INC., CARCILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC. and WILLOW BROOK FOODS, INC.

DEFENDANTS

DEFENDANT COBB-VANTRESS, INC.'S FIRST MOTION TO COMPEL DISCOVERY

COMES NOW Defendant Cobb-Vantress, Inc. ("Cobb-Vantress") by and through its attorneys, and moves this Court pursuant to Fed. R. Civ. P. 37(a) to enter an order compelling Plaintiffs to answer and respond to Cobb-Vantress' First Set of Interrogatories and Requests for Production of Documents Propounded to Plaintiffs. In support of its First Motion to Compel Discovery, Cobb-Vantress states the following:

I. INTRODUCTION

In this case, Plaintiffs allege that the waters, soils, sediments and biota of the Illinois River Watershed ("IRW") have been injured or "polluted" through the acts of numerous poultry

growers and poultry companies. *See generally*, First Am. Compl. (Dkt. No. 18). In environmental litigation, there is perhaps no more relevant and important evidence than the results of environmental sampling conducted in the area of the alleged contamination. In pleadings filed of record in this case and in hearings conducted before this Court, Plaintiff have touted their environmental sampling program and have even gone so far as to petition the Court to grant discovery motions based on the claim that the results of their sampling "confirm" injury to the IRW from constituents originating from poultry litter applications occurring in the IRW. *See* Pls. Mot. for Leave to Conduct Limited Expedited Discovery (Dkt. No. 210) (hereinafter "Plaintiffs' Discovery Motion")

The instant motion focuses on the question of whether Cobb-Vantress, a defendant in this case, will be permitted to discover the results of Plaintiffs' environmental sampling in the IRW. Plaintiffs seek to withhold all information relating to their environmental sampling under a claim of "attorney work product." As demonstrated hereinafter, Plaintiffs' attorney work-product claims are specious and this Court should order Plaintiffs to promptly and fully disclose all information and documents sought by Cobb-Vantress in its First Set of Interrogatories and Requests for Production of Documents Propounded to Plaintiffs (hereinafter "First Set of Discovery").

II. Cobb-Vantress' Discovery Requests and Plaintiffs' Responses/Objections[1]

On April 5, 2006, after reviewing Plaintiffs' Discovery Motion, which specifically asked this Court to grant relief based on supposed results of Plaintiffs' sampling program, counsel for Cobb-Vantress served upon Plaintiffs a narrow set of discovery requests consisting of one (1) interrogatory and three (3) requests for production of documents. *See* Ex. 1, Cobb-Vantress,

[1] In compliance with LCvR 37.2(d), the verbatim discovery requests, responses and objections which are the subject of this motion are attached hereto as Exhibits 1 and 2 and incorporated herein by reference.

First Set of Discovery. All four discovery requests sought information or documents pertaining to sampling conducted by Plaintiffs during the period of January 1, 2003 to the present. The singular interrogatory sought basic information such as the dates and locations of sampling, the identity of persons involved in the sampling, the type of samples collected (*i.e.*, litter, sediments, soils, air, groundwater or surface water) and the results of any tests conducted on the samples. *See* Ex. 1, First Set of Discovery, Interrog. No. 1. Request for Production No. 1 sought documents related to Plaintiffs' sampling events such as laboratory reports, photographs and site sketches. *See* Ex. 1, First Set of Discovery, RFP No. 1. The two remaining requests for production of documents sought documents relating to Plaintiffs' "investigations" into alleged "groundwater contamination" and the Poultry Integrator Defendants' waste disposal practices" described in paragraph 4 of Plaintiffs' Discovery Motion. *See* Ex. 1, First Set of Discovery, RFP Nos. 2 and 3.

Plaintiffs responded to the First Set of Discovery on May 5, 2006 with wholesale objections and the flat refusal to provide any of the information sought or to produce any of the documents requested. *See* Ex. 2, Objections and Responses of State of Oklahoma to Separate Defendant Cobb-Vantress, Inc.'s First Set of Interrogatories and Requests for Production of Documents (hereinafter "Plaintiff's Objections and Responses"). Plaintiffs attached to their Objections and Responses a fifty-three (53) page "Privilege Log" on which they provided extremely generic descriptions of 279 different documents, photographs and videos which were responsive to the First Set of Discovery but were withheld by Plaintiffs under a claim of "attorney work product." In accordance with Fed. R. Civ. P. 37(a)(2(B), Cobb-Vantress has made good faith efforts to resolve this matter without the necessity of intervention by this Court, but Plaintiffs refuse to provide the requested information and documents.

III. The Information and Documents Sought are Discoverable

Plaintiffs' attempt to withhold information responsive to the First Set of Discovery under a claim of attorney work-product must fail for several reasons. First, to the extent that Cobb-Vantress is seeking to discover *facts*, the attorney work-product doctrine does not even apply. Second, any colorable attorney work-product claim for the subject information and documents, was waived when Plaintiffs placed their investigation and environmental sampling and the results of those activities "at issue" in this case. Finally, even if the work-product doctrine applied and no waiver has occurred, Cobb-Vantress easily meets the substantial need or exceptional circumstances tests for discovery of otherwise privileged materials under Rules 26(b)(3) and 26(b)(4)(B).

A. The Attorney Work-Product Doctrine Does Not Prevent the Discovery of Facts

The First Set of Discovery does not seek to discover the mental impressions, legal theories or legal strategy of Plaintiffs' counsel; nor does it seek to discover the opinions of Plaintiffs' experts. The First Set of Discovery seeks only to discover *facts* relating to the nature, extent, manner and results of sampling and investigations conducted by Plaintiffs with respect to environmental conditions in the IRW.

It is hornbook law that the attorney work-product doctrine provides no shield against the discovery of *facts* learned by a party or its counsel during the course of their investigation of potential or asserted claims. *See, e.g., Feldman v. Pioneer Petroleum, Inc.* 87 F.R.D. 86, 89 (D.Okla. 1980) (citing 8 Wright, Miller & Marcus, *Federal Practice and Procedure* § 2023). The First Set of Discovery seeks, among other things, to discover the *facts* about Plaintiffs' investigation and environmental sampling in the IRW. For example, through Interrogatory No. 1, Cobb-Vantress seeks to discover the dates and locations of sampling, the identity of

persons involved in the sampling and the type of samples collected. Cobb-Vantress also seeks to discover the results of any tests conducted on the samples. Those results will reveal the environmental conditions that existed in the media sampled on the specific data and time when the sample was collected.

Courts have consistently held that facts gathered by attorneys or experts during their investigation into matters relevant to litigation do not constitute attorney work-product and may be discovered by an adverse party. *See, e.g., Resolution Trust Corp. v. Dabney*, 73 F.3d 262 (10th Cir. 1995) (requiring a party to answer interrogatories regarding facts learned during an investigation by counsel "because the work product doctrine is intended only to guard against divulging the attorney's strategies and legal impressions, it does not protect facts concerning the creation of work product or facts contained within work product.")(citing *Feldman v. Pioneer Petroleum, Inc.*, 87 F.R.D. 86, 89 (W.D. Okla. 1980)); *Atl. Richfield Co. v. Current Controls, Inc.*, 1997 WL 538876, at *3 (W.D.N.Y. Aug. 21, 1997) (finding that facts gathered by experts were not privileged attorney work product and could be discovered "by, for example, serving interrogatories on ARCO and/or by deposing the consultants.").

Discovery regarding investigations and sampling conducted in connection with environmental litigation is clearly appropriate. The facts relating to and the results of such sampling and investigations cannot be withheld under a claim of attorney work-product privilege. Courts have properly recognized that "environmental test results contain relevant, non-privileged facts." *Horan v. Sun*, 152 F.R.D. 437, 439 (D. R.I. 1993) (ordering a party to respond to an interrogatory materially identical to Cobb-Vantress' Interrogatory No. 1). In *Horan*, the court required a party to answer an interrogatory which sought the results of assessments or environmental testing, the engineering specifications for any such test, the person

conducting the test, the precise location on the premises of any such test, the qualifications and training of any person conducting the test, the quality assurance techniques used to validate any testing methods, and the precise location on the premises of any oil, gasoline, petroleum-based substances or chemical substances discovered by any test. *See Horan*, 152 F.R.D. at 437-438. This is the same type of information Cobb-Vantress seeks to discover in the present case.

As the foregoing discussion of legal authority makes clear, the *facts* that Cobb-Vantress seeks to discover through its First Set of Discovery are not covered by the attorney work-product doctrine and are fully discoverable in this case. Consequently, Plaintiffs' refusal to provide the information sought by Cobb-Vantress in its First Set of Discovery is unjustified and this Court should order Plaintiffs to promptly and fully respond to that discovery.

B. Plaintiffs have Waived Any Work-Product Protections that Might Otherwise Apply.

The attorney work-product doctrine cannot be used both as sword and as a shield. When a party or its counsel affirmatively uses information otherwise covered by the attorney work-product privilege to its advantage in litigation, the protections from discovery into that information and related topics are waived. This principle of law is commonly referred to by courts and legal scholars as "at issue waiver." *See* Wright, Miller & Marcus, *Federal Practice and Procedure* § 2016.2; *see also* 6 James Wm. Moore et al., *Moore's Federal Practice* ¶ 26.70(6)(c) (3d ed. 1997).

This Court has previously recognized "at issue waiver" of attorney work-product protections. In *Sinclair Oil Corp. v. Texaco, Inc.*, 208 F.R.D. 329, 335 (N.D. Okla. 2002), this Court recognized that "[t]hree factors are consistently applied by the courts in evaluating whether or not a party has waived an otherwise applicable privilege through some affirmative act." Those three factors are as follows:

1. Whether the assertion of the privilege is the result of some affirmative act, such as filing suit or asserting an affirmative defense, by the asserting party.

2. Whether the asserting party, through the affirmative act, put the protected information at issue by making it relevant to the case.

3. If the privilege was applied, would it deny the opposing party access to information that was vital to the opposing party's defense.

Id. (citing *Hearn v. Rhay*, 68 F.R.D. 574, 580 (E.D. Wash. 1975); *see also Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 199 F.R.D. 677, 681 (N.D. Okla. 2001) (citing *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975)).

The test for an "at issue waiver" is easily met on the facts before the Court. The assertion of the attorney work-product privilege is the result of an affirmative act by Plaintiffs. This lawsuit was initiated by the Plaintiffs. Furthermore, Plaintiffs have clearly placed the information which they now seek to protect "at issue" by relying upon the alleged results of its investigation and sampling as the basis for Plaintiffs' Discovery Motion. In support of their request for relief from this Court, Plaintiffs claimed:

- That their "***investigation*** of the Poultry Integrator Defendants' waste disposal practices ***has revealed that certain contaminants*** associated with the land disposal of poultry waste ***exist at levels within the environment*** such that they either pose a risk to human health or lead to the creation of chemicals which threaten human health." *Id.* at 4 (emphasis added).

- That the scientific investigations conducted by Plaintiffs "***have concluded that bacteria from the Poultry Integrators Defendants' disposal practices are contaminating the groundwater*** in the IRW." *Id.* (emphasis added)

- Plaintiffs also assert that their scientific investigation has revealed that 1) "the ***water in the IRW contains levels of bacteria*** which pose a danger to human health from primary body contact (swimming, wading and canoeing)" and 2) "***ground water, including water in the numerous springs in the IRW, has been contaminated*** so as to be a hazard to persons who drink from such sources." *Id.* at 9-10 (emphasis added)

- That through their investigation, Plaintiffs have found that the waste disposal practices of the Poultry Integrator Defendants "have caused algae to form in the once pristine waters of the IRW." *Id.*

Clearly Plaintiffs cannot tout the results of their sampling program as the reason this Court should grant Plaintiffs' Discovery Motion (a request which was granted) and then refuse to allow the defendants and the Court to examine the sampling data that formed the basis of the Plaintiffs' successful motion.

The third and final factor of the "at issue waiver" test is also met. The documents and information which Plaintiffs seek to withhold under its claim of attorney-work-product are vital to Cobb-Vantress' ability to adequately prepare a defense to Plaintiffs' claims. Cobb-Vantress has no other means of obtaining information regarding the environmental conditions that existed on the dates and in the locations sampled by Plaintiffs in the past. In addition, Cobb-Vantress needs to know as soon as possible what constituents Plaintiffs believe they have found in elevated levels in the IRW and where in the IRW the relevant samples were taken so that it can conduct its own investigation and, if necessary, environmental sampling to determine the extent of the alleged contamination and the likely source of any such contamination.

The "at issue waiver" doctrine clearly applies with respect to the information and documents sought by Cobb-Vantress in its First Set of Discovery. Plaintiffs have placed their investigations and sampling of environmental conditions in the IRW at issue by touting the claimed results of those activities in Plaintiffs' Discovery Motion. As such, any claim of attorney work-product protection that might otherwise exist has now been waived. Accordingly, this Court should order Plaintiffs to promptly and fully respond to the First Set of Discovery.

C. Even if the Attorney Work-Product Doctrine Applies, the Information and Documents Sought are Discoverable Under Federal Rules 26(b)(3) or 26(b)(4)(B).

As demonstrated above, Plaintiffs have no valid claim of attorney work-product protection with respect to the information and documents sought in the First Set of Discovery. However, even if the materials and information sought were protected (which they are not), the protections from discovery afforded by the attorney work-product doctrine are not unlimited. The Federal Rules of Civil Procedure expressly provide for the discovery of information and documents covered the attorney work-product doctrine in certain circumstances. FED. R. Civ. P. 26(b)(3) and 26(b)(4)(B).[2]

In their Objections and Responses, Plaintiffs cited the provisions of Rules 26(b)(3) and 26(b)(4)(B) presumably in support of their refusal to produce information or documents which they claimed to be protected by the attorney work-product doctrine. *See generally*, Ex. 2, Pls. Objections and Responses; Ex. 3, Pls. Privilege Log. Plaintiffs' reliance on those provisions as a basis for withholding documents and information is misplaced. Those provisions actually *permit* a party to discover information and documents notwithstanding a claim of attorney work-product protection.

Federal Rule 26(b)(3) provides that:

> "a party ***may obtain discovery of documents and tangible things*** otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . ***upon a showing that the party seeking discovery has substantial need*** of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

[2] The "at-issue waiver" doctrine discussed above also applies to the protections afforded by Rule 26 to attorney or expert work product. *See Davidson v. Goord*, 215 F.R.D. 73, 78 (W.D.N.Y. 2003) ("The 'at-issue' waiver rule also applies to . . . material prepared in contemplation of litigation otherwise protected from discovery by Fed.R.Civ.P. 26(b)(4).")

FED. R. Civ. P. 26(b)(3) (emphasis added). In considering whether the "substantial need" test of Rule 26(b)(3) is met, the courts have generally distinguished between "ordinary" work product consisting of "raw factual information" and "opinion work product" which includes the thoughts and mental impressions of attorneys or experts. Ordinary work product and raw factual information is discoverable upon a lesser showing of need than is opinion work product. *See, Sinclair Oil Corp.*, 208 F.R.D. at 334; *see also Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000); *see also In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459, 462 (S.D.N.Y. 1996).

Rule 26(b)(4)(B) focuses specifically on the discoverability of facts or opinions of **non-testifying experts.** This rule states:

> [a] party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and ***who is not expected to be called as a witness at trial*** only . . . ***upon a showing of exceptional circumstances*** under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

FED. R. CIV. P. 26(b)(4)(B) (emphasis added). As a preliminary matter, it is important to note this rule and the conditioning of discovery of experts upon a showing of "exceptional circumstances" only applies to experts who are **not expected to testify at trial**. While Plaintiffs have invoked the provisions of Rule 26(b)(4)(B) as a basis for withholding documents and information, they have done so without any indication that the experts who apparently gathered or know of the facts which are the subject of the First Set of Discovery are not expected to testify at trial. Plaintiffs should not be permitted to sandbag Cobb-Vantress by withholding documents or information under a rule that only applies to non-testifying experts while simultaneously reserving the ability to designate the relevant experts as testifying experts at some point in the future.

In any event, even if Plaintiffs were willing to stipulate to the non-testifying status of the experts at issue sufficient to bring those experts within the provisions of Rule 26(b)(4)(B), the information and documents sought by Cobb-Vantress would still be discoverable upon a showing of exceptional circumstances. Rule 26(b)(4)(B) allows discovery of facts known to an expert where the seeking party can demonstrate "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." FED. R. CIV. P. 26(b)(4)(B). "Exceptional circumstances may be shown when: (1) the condition observed by the expert is no longer observable . . ." *Hollinger Int'l., Inc. v. Hollinger, Inc.*, 230 F.R.D. 508, 522 (N.D. Ill. 2005) (citing *Ludwig v. Pilkington N. Am., Inc.*, 2003 WL 22242224, at *3 (N.D. Ill. Sept. 29, 2003)).

Whether analyzed under the "substantial need" test of Rule 26(b)(3) or the "exceptional circumstances" test of Rule 26(b)(4)(B), Cobb-Vantress is clearly entitled to the information and documents sought in its First Set of Discovery. Plaintiffs chose not to notify Cobb-Vantress of the times, dates, locations and extent of their sampling activities in the IRW. As such, Cobb-Vantress was not present to observe or document the environmental conditions that existed in the media sampled by Plaintiffs on the dates and in the locations sampled. The information sought by Cobb-Vantress is dependent upon, and influenced by, changeable conditions, such as the weather and other environmental factors. The samples collected by Plaintiffs and the results of tests performed on those samples cannot be replicated by Cobb-Vantress as the conditions under which Plaintiffs' sampling occurred are no longer observable. The only evidence that exists with respect to the environmental conditions occurring on the dates and in the locations at issue is the evidence gathered by Plaintiffs through their sampling events. Cobb-Vantress cannot go back in

time and recreate the conditions that existed during Plaintiffs' sampling. Accordingly, this Court should order Plaintiffs to promptly and fully respond to the First Set of Discovery.

IV. CONCLUSION

For the foregoing reasons, Separate Defendant Cobb-Vantress, Inc. requests that this Court enter an order compelling Plaintiffs to fully respond to Cobb-Vantress's First Set of Interrogatories and Requests for Production of Documents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2006, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants.

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and I further certify that a true and correct copy of the above and foregoing will be mailed via first class U.S. Mail, postage properly paid, on the following who are not registered participants of the ECF System:

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